DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
1777 HARDEE AVENUE SW
FORT MCPHERSON GEORGIA 30330-1062

REPLY TO
ATTENTION OF

AFLG-PRO (715) 8 Dec 98

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Contracting Information Letter (CIL) 99-7, Protest Analysis for Fourth Quarter FY 98

1. Protests filed:

	4Q98	3Q98	4Q97
o AMC	24	13	32
o USACE	11	10	18
o DA Other	47	34	56
TOTAL	**82**	**57**	**106**

2. Number of protests sustained/granted:

	4Q98	3Q98	4Q97
o AMC	0	0	0
o USACE	0	1	1
o DA Other	0	1	2
TOTAL	**0**	**2**	**3**

3. Lessons learned, issues and trends:

AMC:

a. **Andrulis Corp (B-281002), Dismissed**. Government made a determination to re-evaluate proposals after protest was filed. During the KO's review of the scoring documents, inconsistencies were noted in the summary reports; therefore, corrective was action taken.

b. **RTF Industries, Inc., (B-280422), Dismissed.** Ensure that the contract file contains documentation of the entire procurement process. This includes comprehensive evaluation write-ups, competitive range determination, and the source selection documentation. Ensure in a best value procurement that price/cost is an award factor.

c. **Remington Arms Co, Inc., (B-279664), Withdrawn.** This procurement was a sole source GOCO operation. Ensure the authority in FAR 6.302-3 is used to justify a sole source award.

USACE:

a. **Adirondack Construction Corporation, (B-280015.2), Aug 25, 1998.** The New York District determined Adirondack's bid late. Adirondack's representative arrived at the room stated in the solicitation more than one hour before time set for bid opening. The Adirondack representative noted and relied upon the time shown on one of three clocks in the designated room and then utilized a telephone in the hallway outside the designated room. Less than one hour before bid opening the government official changed the bid opening room posting signs on and around the door to the previously designated room. The Adirondack representative remained on the telephone until less than 30 seconds before bid opening and the bid was received 20 seconds late.

GAO iterated that decisions concerning late bids are based on a comparison of actions by the government and the bidder to determine the primary or paramount cause of a late bid. It is within the agency's discretion to determine that its actions were the primary cause of the late receipt and to accept the bid, or to conclude that its actions did not constitute the primary cause and reject the bid

4. The following two cases are of interest:

A. **Winstar Communications, Inc., vs. The United States, No. 98-480C.** United States Court of Federal Claims. Sep 9, 1998.

OPINION

This procurement protest arose out of Winstar Communications, Inc's (WinStar) objections to a solicitation issued by the General Services Administration (GSA). GSA procured local telecommunications services for federal agencies

under a nationwide program known as the Metropolitan Area Acquisition (MAA). The program was to begin in three cities, New York, San Francisco, and Chicago. The Request for Proposals (RFP) for New York was issued on Feb 26, 1998. The New York RFP stated that one indefinite delivery/indefinite quantity contract for local telecommunications services would be awarded for an area consisting of the five boroughs of New York City and suburban locations in New York and New Jersey.

WinStar objected to the solicitation on two grounds. First, WinStar alleged that GSA's decision to award a single contract was arbitrary and contrary to the agency's legal duty to give preference to awarding multiple indefinite delivery/indefinite quantity contracts under a single solicitation to the maximum extent practicable. Second, WinStar asserted that the geographic scope of the proposed New York contract gave the incumbent, Bell Atlantic Co., an unfair competitive advantage, contrary to GSA's legal obligation to obtain full and open competition. WinStar sought declaratory and injunctive relief and proposal preparation costs.

The Federal Court of Claims concluded that GSA's decision to award a single contract under the New York RFP was arbitrary, capricious, and not in accordance with the legal preference for multiple awards. It was also concluded that the geographic scope of the proposed New York contract was not anti-competitive or otherwise improper. Finally, it was concluded that relief should be limited to a declaratory judgment setting aside GSA's decision to award a single contract under the New York RFP and all related RFP provisions. The plaintiff's motion was granted to the extent it sought such relief and was otherwise denied. Defendant's motion was denied in its entirety.

I. BACKGROUND

1. The Federal Acquisition Streamlining Act of 1994, (FASA) established a preference for awarding, to the maximum extent practicable, multiple task or delivery order contracts for the same or similar services or property. FASA also required that regulations implementing the preference establish criteria for determining when award of multiple task or delivery order contracts would not be in the best interest of the Federal Government.

In its report on the bill which became FASA, the Senate Committee on Governmental Affairs explained that the preference for awarding multiple task or delivery order contracts was based on the finding that indiscriminate use of task order contracts or broad categories of ill-defined services unnecessarily diminishes competition and results in the waste of taxpayer dollars. In many cases, this problem can effectively be addressed, without significantly burdening the procurement system, by awarding multiple task order contracts for the same or similar services and providing reasonable consideration to all such contractors in the award of such task orders under such contracts. The Committee intended that all federal agencies should move, to the use of multiple task order contracts, in lieu of single task order contracts, wherever it is practical to do so.

2. GSA is charged with responsibility for acquiring telecommunications services for federal agencies as a follow-on to FTS 2000. The procurement of local telecommunications services is covered under the MAA program. A separate program known as FT5 2001 covers long distance services. The MAA program is divided into two phases, the initial qualification phase and the RFP phase. During the initial qualification phase, interested vendors are qualified for participation in the MAA program generally. In response to a Request for Qualification Statements (RQS), an interested vendor must submit a qualification statement demonstrating its ability to meet the basic technical and management requirements of the MAA program. GSA then either qualifies the vendor or identifies deficiencies in its statement, which must be remedied during the second phase of the program.

The second phase involves the issuance of RFPs and the award of contracts for specific metropolitan areas. Three pilot cities were selected. If the results in these cities were favorable, GSA planned to expand the MAA program to as many as 43 metropolitan areas. When submitting proposals, vendors whose qualification statements were approved during the initial qualification phase needed only todemonstrate their ability to meet the unique technical, management, and price requirements of the applicable metropolitan area. If a vendor's qualification statement was deemed deficient, the vendor must rectify the deficiencies in its proposal in addition to satisfying the unique metropolitan area requirements. Vendors who did not participate in the initial qualification phase may also submit

proposals, but they must demonstrate their ability to meet all of the basic program requirements as well as the area-specific requirements. Federal agencies are not required to participate in the MAA program. The RQS stated that GSA would award one indefinite delivery/indefinite quantity (ID/IQ) task order contract under each metropolitan area RFP. There is no indication that a class determination to make a single award was made pursuant to FAR subpart 1.7. The KO did not prepare a written determination to make a single award prior to release of the RQS. The RQS stated that each MAA contract would be for a base period of four years followed by four one-year options. The contractor was to provide a variety of local telecommunications services across the entire metropolitan area as ordered by GSA. The services may be provided through the contractor's own facilities, through resale of another vendor's services, or through a combination of the two. The contracts will not provide a minimum quantity of services to be ordered. However, to provide adequate consideration, each contract would contain a revenue guarantee that the contractor would be paid regardless of the quantity of services ordered.

The RQS indicated that each MAA contract would contain a Price Maintenance Mechanism. This would allow GSA to adjust the contract prices to match falling prices for comparable services available in the MAA area on publicly available tariffs. GSA may invoke the Price Maintenance Mechanism no more than once every six months.

On Feb 26, 1998, WinStar timely submitted a qualification statement in response to the RQS. The agency issued RFPs for the three pilot cities.

3. The New York RFP

The New York RFP, issued Feb 26, 1998 stated that the government intended to award one ID/IQ contract for the New York metropolitan area. Neither the Acquisition Plan for the MAA program approved during Feb 1998 nor any other document in the record predating the New York RFP explained GSA's decision to award a single contract. Likewise, the KO did not prepare a written determination to make a single award pursuant to FAR 16.504(c)(1) prior to issuance of the solicitation.

4. WinStar's Protest

On Jun 4, 1998, WinStar notified the government of its intent to protest the New York RFP on four grounds, including its objection to GSA's decision to award only one ID/IQ contract. On Jun 5, 1998, before the due date for proposals, WinStar filed its complaint with the Federal Court of Claims. Although the complaint contained four counts, the issues raised in counts I and II were resolved. In Count III, WinStar asserted that the government failed to give preference to awarding multiple ID/IQ contracts under the New York RFP as required by 41 U.S.C. 253h(d)(3) and FAR 16.504(c)(1). In Count IV, WinStar alleged that the geographic scope of the proposed New York contract did not achieve full and open competition as required by the CICA, because it gave an unfair advantage to the incumbent, Bell Atlantic Co, the only company with sufficient facilities to service the entire area directly. The complaint sought an order directing GSA to reform the New York MAA RFP to maximize competition, including, but not limited to, the award of multiple contracts for the New York MAA and the award of contracts for less than the entire GSA-defined MAA region.

WinStar also applied for a temporary restraining order (TRO) and moved for a preliminary injunction prohibiting GSA from accepting proposals in response to the New York RFP until the court decided the merits of the protest. However, following negotiations, GSA agreed to extend the due date for proposals until Aug 6, 1998. GSA also stated that it would not award a contract under the New York RFP until this protest was resolved; therefore WinStar withdrew its application for a TRO and its motion for a preliminary injunction.

5. On Jun 5, 1998, the day after receiving notification of WinStar's intent to protest, the KO in charge of the New York MAA, prepared a Determination that the Indefinite-Quantity Contract is to be Awarded as a Single Award Contract for the New York MAA pursuant to FAR 16.504(c)(1). The determination was subsequently revised and then restated in a declaration dated Jun, 19, 1998, which was attached to defendant's summary judgment motion.

The KO stated that three of the six criteria for determining when multiple awards should not be made justified his decision to award a single contract. First, the KO determined that more favorable terms and conditions, including pricing, would be provided if a single award were made. Second, that the costs of

administrating multiple contracts would outweigh any potential benefits. Finally, that multiple awards would not be in the best interests of the government. These determinations were, in turn, based on four factors. First, based on industry feedback, the KO concluded that a substantial commitment from the government was needed to stimulate the winning vendor to invest in new telecommunications facilities, to reduce investment risks, and to induce vendors to compete for the New York contract.

Second, that a single award would reduce usage charges. The government incurs usage charges for off-net calls but not for on-net calls. On-net calls are government-to-government calls within the contract area serviced by the same vendor. Government-to-government calls within the contract area but serviced by more than one vendor are, off-net and therefore subject to usage charges.

Third, that a single award would produce traffic aggregation that would result in lower prices. This finding was based on the consideration that if a single contractor were able to service all 22,000 lines in the New York area instead of 10,000 or 5,000, it would result in economies of scale that would be passed on to the government in the form of lower prices.

6. The Parties' Contentions

In support of its motion, the government first argued that WinStar had no standing to challenge the KO's single award determination because the purpose of the statutory and regulatory preference for multiple awards was to benefit the government, not WinStar. In addition, defendant contended that WinStar had not alleged an injury resulting from the single award determination, which the court could redress.

The plaintiff challenged GSA's decision to award a single contract under the New York RFP on procedural and substantive grounds. Plaintiff contended that FAR 16.504(c)(1) required the KO to determine whether multiple awards were appropriate before GSA decided to make a single award. Since the KO's analysis was created only after WinStar's protest was filed and months after the single award decision was made, plaintiff contended that it was a post-hoc rationalization, which contravened regulatory requirements. Defendant responded that the KO's determination was timely because it was made before contract award, which is all that FAR 16.504(c)(1) requires.

II. DISCUSSION

1. Standing and Jurisdiction. WinStar was a prospective offeror when it filed this protest and has since submitted a proposal. Furthermore, WinStar's direct economic interests would be affected by GSA's failure to award multiple contacts since WinStar, as an offeror, stands a better chance of receiving a contract if multiple awards are made. WinStar's economic interests would also be affected by a failure to award contracts for less than the entire proposed MAA area. In short, as an actual offeror whose competitive position may improve if the challenged solicitation provisions are set aside, WinStar was an interested party with standing to bring this protest.

2. Standard of Review. Under the standard of review applicable in bid protests, an agency's procurement decisions will not be disturbed unless shown to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law. This standard is a deferential one. The court's role is limited to ensuring that the agency has examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made. The court should not substitute its judgment for that of a procuring agency and should intervene only when it is clear that the agency's determinations were irrational or unreasonable.

3. Procedural Validity of GSA's Single Award Decision

Plaintiff contended that GSA's decision to award a single contract under the New York RFP was procedurally invalid because it was made months before the KO prepared the written determination required by FAR 16.504(c)(1). Defendant responded that KO's determination was timely because it was made before contract award, which is all that FAR 16.504(c)(1) requires.

The regulatory language provides that the KO shall, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources. In making a determination as to whether multiple awards are appropriate, the KO shall exercise sound business judgment as part of acquisition planning. No separate

written determination to make a single award is necessary when the determination is contained in a written acquisition plan or when a class determination has been made in accordance with subpart 1.7.

This procedure was not followed in this case. GSA made the decision to award a single ID/IQ contract per RFP sometime before Nov 26, 1997, when the RQS was released. Likewise, GSA made the specific decision to award a single contract under the New York RFP sometime before the release of the solicitation on Feb 26, 1998. The KO stated that these were program decisions, which he did not make. None of the documents in the record predating the RQS or the RFP explained the basis of GSA's decision. The agency did not make a class determination in accordance with FAR subpart 1.7 or address the single award decision in the Acquisition Plan. Nor did the KO make a separate written determination to make a single award prior to release of the RQS or the New York RFP.

Instead, the KO made the required determination on Jun 5, 1998, over three months after issuance of the New York RFP, six months after issuance of the RQS, and one day after WinStar notified GSA of its intent to file a protest based in part on its objections to the single award decision. Not only is this course of action inconsistent with the procedure contemplated by the FAR, it gives the impression that the KO's determination was prepared to defend against WinStar's protest rather than to impartially determine in the first instance whether multiple awards are appropriate.

4. Substantive validity of the KO's determination to award a single ID/IQ contract under the New York RFP, plaintiff first asserted that his analysis must be set aside because it failed to address and weigh the benefits of awarding multiple contracts as required by FAR 16.504(c)(1).

The KO concluded that three of the six regulatory criteria for determining when multiple awards should not be made justified his decision to award a single contract:

Based on the KO's knowledge of the market, more favorable terms and conditions, including pricing would be provided if a single award were made;

The cost of administration of multiple contracts may outweigh any potential benefits from making multiple awards; and

Multiple awards would not be in the best interests of the Government. 48 C.F.R. 16.504(c)(1).

Defendant responded that multiple awards are simply a means of achieving the benefits of competition among multiple providers. However, the government's assumption that the structure of the New York RFP would foster the same type of competition and achieve the same competitive benefits as multiple contract awards was unsupported and unreasonable. The record indicated that other MAA/FTS 2001 contractors would not provide significant competition for the New York contractor in the near future. Obviously, in light of the forbearance period, the New York contractor would face no competition from these sources during the first year of the contract (25 percent of the base contract term), when the New York contractor was converting federal users to its system. After the forbearance period, other MAA/FTS 2001 contractors interested in competing in New York faced the prospect of breaking the ties the incumbent had established, an obstacle not faced by multiple contractors competing head-to-head from the beginning of the contract term.

Hence, in contrast to direct, immediate, and continuous head-to-head competition for task orders presumed to result from multiple awards, the competition the New York contractor would face under the structure of the MAA program was, at best, deferred and uncertain. Therefore, the government's conclusion that the structure of the MAA program would provide the same competitive benefits as multiple contract awards was unreasonable and did not excuse the KO's failure to consider the benefits of multiple awards.

In summary, by failing to consider the benefits of multiple awards, the KO's analysis violates applicable provisions of FAR 6.504(c)(1). The government's contention that the single-award structure of the New York MAA would achieve the same benefits as multiple awards without the costs was unreasonable and did not excuse the KO's violation. Finally, the KO's conclusion that a single award was in the best interests of the government t is also unreasonable, irrespective of the non-compliance with FAR 16.504(c)(1).

Though WinStar requested declaratory and injunctive relief as well as proposal preparation costs, it was determined that WinStar's injury could be alleviated by declaring GSA's decision to award a single contract under the New York RFP and all RFP provisions reflecting that decision invalid.

5. Validity of the Geographic Boundary of the New York MAA

Plaintiff also asserted that the geographic scope of the New York MAA was so large as to unduly restrict competition in violation of CICA. Plaintiff contended that the broad boundary of the MAA fills no legitimate government need while unfairly favoring the incumbent, Bell Atlantic, the only company with sufficient facilities to service the entire area directly. Defendant responded that the boundary was reasonably drawn to include existing and potential federal users in the New York area, and that any competitive disadvantage WinStar was suffering was the result of its own circumstances, not any government action.

CONCLUSION

It was determined that there were no genuine issues of material fact and that GSA's decision to award a single ID/IQ contract under the New York RFP was arbitrary, capricious, and contrary to law. However, it was also concluded that the geographic scope of the proposed New York MAA contract was not improper and that plaintiff was entitled only to declaratory relief. Therefore, plaintiff's Jul 10, 1998 cross-motion for summary judgment was GRANTED in part and DENIED in part. Defendant's Jun 26, 1998 motion for summary judgment was DENIED in its entirety. Accordingly, it is hereby ORDERED that:

(1) Final Judgment is entered declaring the Contracting Officer's determination and GSA's decision to award one ID/DQ contract under RFP no. TQD-NY-98-1001 and all RFP provisions reflecting that decision null and void as contrary to the requirements of FAR 16.504(c)(1) and lacking a reasonable basis;

(2) Except as granted in (1), all other relief sought in this matter was DENIED. Each party must bear its own costs.

B. **Firearms Training Systems, Inc.**, contract injunction; pre-award communications between the government and offerors.

Issue: Pursuant to FAR 15.306; competitive range determinations and discretion of the agency to modify the anticipated timing of a competitive range determination set forth in the solicitation.

I.

Firearms Training Systems, Inc. sought declaratory and injunctive relief setting aside the KO's determination not to consider further plaintiff's proposal submitted in response to RFP issued by the Naval Air Warfare Center Training Systems Division. This decision addressed one of the issues raised in the cross-motions -- whether prior to rejecting plaintiff's proposal the Navy was obligated under FAR 15.306(d)(3) to enter discussions with plaintiff so as to inform plaintiff of the weaknesses the Navy perceived in plaintiff's proposal and to give plaintiff an opportunity to respond to the Navy's concerns. The court concluded that the Navy was not so obligated.

II.

The instant solicitation covered an Engagement Skills Trainer, which was a computer-operated simulator used in training armed forces personnel, both individually and collectively, in the use of various weapons. Six firms submitted proposals in response to the solicitation. The Navy eliminated one of the offerors from consideration, because the Navy determined that the offeror's proposal not responsive to the terms of the solicitation and did not provide sufficient information for the Navy to perform a meaningful evaluation of its technical merit. The Navy invited the other six offerors, including plaintiff to conduct a demonstration of their proposed systems as provided for in the solicitation.

After the demonstration, the Navy informed plaintiff and four of the five offerors that they were no longer being considered for contract award. In a May 11, 1998, letter, the Navy informed plaintiff that its proposal received an overall rating of unacceptable because it did not satisfy the government's requirements in the areas of System Operations and System Performance. The letter further informed plaintiff that its proposal . . . cannot be included in the competitive range for the procurement and that in accordance with FAR Subpart 15.6, discussions would not be held with your firm and revisions

to your proposal will not be accepted. The Navy offered to debrief plaintiff as to the Navy's findings and plaintiff accepted. At the debriefing, the Navy identified nine weaknesses in plaintiff's proposal. The Navy's rejection of plaintiff's proposal and the proposals of four other remaining offerors resulted in the Navy establishing a competitive range of only one offeror. The Navy then determined to commence discussions.

III.

(1) An analysis of the parties' respective arguments concerning the Navy's alleged obligation to discuss with plaintiff the weaknesses the Navy found in plaintiff's proposal requires an understanding of the operation of the recently adopted FAR 15.306, which governs Exchanges with offerors after receipt of proposals. FAR 15.306(a), (b), and (d), respectively, authorizes three different types of exchanges between the government and offerors prior to contract award. Pursuant to FAR 15.306(a), when an award is to be made without discussions between the parties, the government may conduct limited exchanges, or clarifications, with the offerors. FAR 15.306(a) provides:

(2) If award will be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor clerical errors.

(3) Award may be made without discussions if the solicitation states that the government intends to evaluate proposals and make award without discussions. If the solicitation contains such a notice and the government determines it is necessary to conduct discussions, the rationale for doing so shall be documented in the contract file . . . Such communications may be conducted to enhance the government's understanding of the proposals . . . or to facilitate the government's evaluation process . . . for the purpose of establishing the competitive range. These communications may be conducted with offerors whose past performance information is the determining factor preventing them from being placed within the competitive range or with offerors whose exclusion from, or inclusion in, the competitive range is uncertain.

FAR 15.306(b)(3) stresses that these communications shall not provide an opportunity for the offeror to revise its proposal and lists the topics that may be addressed in these communications, such as ambiguities as to perceived weaknesses.

IV.

The Administrative Record unambiguously demonstrated that prior to eliminating plaintiff's proposal from further consideration, the KO did not intend to allow offerors to revise their proposals, to enter discussions under FAR 15.306(d), or to make a competitive range determination. The solicitation informed offerors that the government intended to evaluate offers and award a contract without discussions with offerors, and, after receiving the proposals, the Navy sought from each offeror to which it extended an offer to conduct a system demonstration answers to a list of clarification questions which was prefaced with the admonition that a revision to your proposal is not requested at this time. Indeed, when plaintiff characterized its exchanges with the Navy in this regard as discussions, a Navy representative was quick to clarify the contracting officer's contrary intent by stating: **You are hereby advised NO discussions have taken place.** As to a competitive range determination, a Navy memorandum to the file memorializing the Navy's decision to invite six of the seven offerors to conduct a system demonstration stated that no competitive range cuts were made. Consistent with this position, the Navy did not at that time document in the file any rationale for abandoning its prior intent to evaluate the proposals without discussions, as would be required under FAR 15.306(a)(3). In addition, when the Navy informed plaintiff after the demonstration that it was eliminating plaintiff's proposal from further consideration, the Navy did not suggest that plaintiff's proposal was being eliminated from a competitive range previously determined but rather that plaintiff's proposal cannot be included in the competitive range for the procurement.

Plaintiff contended that regardless of whether the Navy intended to make a competitive range determination when it invited six of the seven offerors to conduct a system demonstration, the Navy created such a competitive range at that time under the terms of the solicitation. Plaintiff relied upon an internal Navy planning document that anticipated that the offerors would not demonstrate their systems until after a competitive range determination was made, and a consistent

statement in the solicitation that offerors who submit a responsive proposal that is within the competitive range shall be invited to provide a system demonstration. Based on these authorities, plaintiff argues that the Navy must be deemed to have made a competitive range determination before the system demonstrations took place, and that having made such a determination, the Navy was obligated under FAR 15.306(d)(3) to enter discussions with plaintiff concerning any perceived weaknesses in plaintiff's proposal.

Nothing in the solicitation specifically precludes the Navy during the procurement process from postponing any competitive range determination. Moreover, the FAR anticipates that the agency generally will have broad discretion to evaluate the particular facts before it and to determine what type of communication with the offerors is appropriate and when to make any competitive range determination. Given this setting, the court concluded that the Navy acted within its discretion when, in rejecting plaintiff's proposal, it determined that the Navy had not made a competitive range determination and was not obligated to engage in discussions with plaintiff concerning any weaknesses in its proposal. Summary judgment is warranted where there is no dispute as to any material issue of fact and the moving party is entitled to judgment as a matter of law. Because there were no material facts in dispute here, defendant's motion for summary judgment on this issue was granted.

Conclusion

The court concluded that the Navy was not obligated to enter into discussions with plaintiff regarding perceived weaknesses in plaintiff's proposal. Accordingly, defendant's motion for summary judgment on this issue was granted.

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